

Control Number: 37917



Item Number: 90

Addendum StartPage: 0

**SOAH DOCKET NO. 473-10-5401
DOCKET NO. 37917**

**APPLICATION OF DPI ENERGY,
LLC FOR AN AMENDMENT TO ITS
RETAIL ELECTRIC PROVIDER
(REP) CERTIFICATION, PURSUANT
TO SUBST. R. §25.107**

§
§
§
§
§

**BEFORE THE STATE OFFICES

OF

ADMINISTRATIVE HEARINGS**

COMMISSION STAFF'S REPLY BRIEF

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director
Legal Division

Keith Rogas
Deputy Division Director
Legal Division

Robert M. Long
Managing Attorney
Legal Division

Shelah J. Cisneros
Attorney – Legal Division
State Bar No. 24045661
(512) 936 7292
(512) 936 7268 (facsimile)
Public Utility Commission of Texas
1701 North Congress Avenue
P.O. Box 13326
Austin, Texas, 78711-3326

DATE: MARCH 18, 2011

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	REVOCATION IS THE APPROPRIATE ACTION.....	4
III.	DPI ENERGY ADMITTEDLY IS IN VIOLATION OF COMMISSION RULES AND REFUSES TO COMPLY WITH THE COMMISSION'S PROHIBITION ON REP OWNERSHIP AND CONTROL IN P.U.C. SUBST.R.25.107 (G)(1)(D)	6
IV.	DPI ENERGY'S PROPOSED TRUST AGREEMENT IS SPECULATIVE, NOT RIPE FOR APPROVAL IN THIS PROCEEDING, AND DOES NOT CURE DPI ENERGY'S ADMITTED VIOLATION OF P.U.C. SUBST. R. 25.107(G)(1)(D).....	7
V.	THE "ADMIRABLE SPIRIT OF REDEMPTION" DOES NOT APPLY TO A COMPANY THAT IS IN SIGNIFICANT VIOLATION OF COMMISSION RULES AND IS CURRENTLY BEING INVESTIGATED FOR ADDITIONAL RULE VIOLATIONS.....	9
VI.	MR. LATEEF'S HISTORY IN THE TEXAS REP MARKET	11
A.	Pursuant to Commission Rules, Riverway Power is an Affiliate of dPi Energy and was Required to be Disclosed in the Change of Ownership Application.....	12
B.	It is a Violation of Commission Rules to Provide False and Misleading Information to the Commission; Specific Intent is Irrelevant.....	13
C.	Riverway Power's Debts to ERCOT and TDUs	13
D.	Mr. Lateef is Responsible for the Actions of National Power During the Time he Served as Owner, President and Director of the REP	15
VII.	PATTERN OF CLAIMING 'I'M NOT RESPONSIBLE' AND DISREGARD FOR COMMISSION'S AUTHORITY AND RULES	17
VIII.	CONCLUSION.....	19

**SOAH DOCKET NO. 473-10-5401
DOCKET NO. 37917**

APPLICATION OF DPI ENERGY, LLC FOR AN AMENDMENT TO ITS RETAIL ELECTRIC PROVIDER (REP) CERTIFICATION, PURSUANT TO SUBST. R. §25.107	§	BEFORE THE STATE OFFICES OF ADMINISTRATIVE HEARINGS
	§	
	§	
	§	
	§	

COMMISSION STAFF’S REPLY BRIEF

I. INTRODUCTION

The sole remaining issue in this proceeding is Staff’s counter-petition to revoke the retail electric provider (REP) certificate of dPi Energy. dPi Energy has repeatedly and unequivocally stated its intention to withdraw the underlying REP Change of Ownership Application.¹

There is abundant evidence that both dPi Energy and Zahed “Ed” Lateef have a history of violating Commission rules, and it is undisputed that Mr. Lateef and dPi Energy are both currently in violation of the Commission’s rule regarding prohibition of REP ownership and control.²

Although dPi Energy has proposed a hypothetical trust in an attempt to cure this significant rule violation, the trust has not been executed and formally presented to the Commission for review in this proceeding or a separate change of ownership REP amendment application. Furthermore, there is ample evidence that the proposed trust instrument would provide many avenues for Mr. Lateef to exert direct and indirect control over dPi Energy, in violation of the Commission’s rules.

¹ Ex. No. 16, Responsive Testimony of Zahed “Ed” Lateef on behalf of dPi Energy, LLC (Lateef Responsive) at 1:17-21; Ex. No. 19, Rebuttal Testimony of Zahed “Ed” Lateef on behalf of dPi Energy, LLC (Lateef Rebuttal) at 2:9-10 in which Mr. Lateef testified, “...dPi has effectively abandoned its effort to have the Commission approve my acquisition of dPi.”

² P.U.C. SUBST. R. 25.107(g)(1)(D) which states, “[a]n individual that was a principal of a REP that was a principal of a REP that experienced a mass transition of the REP’s customers to POLR shall not...own more than 10% of a REP or directly or indirectly control a REP.”

For the reasons stated in this pleading and Staff's initial brief, the Commission should revoke the REP certificate of dPi Energy.

II. REVOCATION IS THE APPROPRIATE ACTION

dPi Energy attempts to divert the vast amount of negative attention upon it by accusing Staff of instituting this "draconian" and "unduly harsh" proceeding in its "zeal to run headlong to revocation."³ However, dPi Energy's martyr stance is unfounded as is abundantly clear from both the timeline and procedural history of this proceeding.

The facts and evidence demonstrate that Mr. Lateef is responsible for dPi Energy's current predicament in facing revocation. This case was initiated in January of 2010 when dPi Energy filed a REP amendment application to report the Change in Ownership of its parent company.⁴ At that time, it was apparent that dPi Energy had been in violation of Commission rules since Mr. Lateef purchased dPi Energy from Rent a Center on November 17, 2009, and had obtained more than 10% ownership of the company.⁵

Despite Staff's considerable and lengthy efforts to find a solution that would result in dPi Energy's compliance with the Commission's rules and that would benefit the public interest, dPi Energy and Mr. Lateef have not been willing to accept any alternative that would place dPi Energy into compliance but result in a financial loss of Mr. Lateef's investment in dPi Energy. As CenterPoint Energy Houston Electric, LLC, Texas-New Mexico Power Company, AEP Texas Central Company, and AEP Texas North Company (all intervenor parties in this proceeding) stated in their initial brief, dPi Energy has wholly failed to correct an admitted violation of the law and the only proper remedy is revocation.⁶

Staff, in its testimony and initial brief, clearly identified the many significant PURA and Commission rule violations by dPi Energy that resulted in Staff's recommendation to revoke dPi Energy's REP certificate. These include:

³ Brief on the Merits of dPi Energy, LLC at 1-2.

⁴ *Id.* at 1; and *See* Brief on the Merits of dPi Energy, LLC at 1: Mr. and Mrs. Lateef, through a company he and his wife own jointly, Amvensys Telecom Holding, LLC (Amvensys) acquired dPi Teleconnect, LLC and dPi Teleconnect's wholly owned subsidiary, dPi Energy.

⁵ Lateef Direct at 1:20-28.

⁶ Initial Brief of CenterPoint Energy Houston Electric, LLC, Texas-New Mexico Power Company, AEP Texas Central Company, and AEP Texas North Company at 1.

- First, and primarily, dPi Energy admits that one of its owners, Mr. Lateef, was a principal of a REP that experienced a mass transition⁷ and now owns more than 10% of dPi Energy which is a violation of P.U.C. SUBST. R. 25.107(g)(1)(D).⁸
- Second, dPi Energy admitted to a pattern of violations that resulted in a Consent Order in which dPi Energy admitted to 27 violations of Commission rules and paid a fine of \$104,250.⁹
- Third, dPi Energy admittedly violated P.U.C. SUBST. R. 25.107(i)(3)¹⁰ in failing to timely amend its REP certificate following the change of ownership and transfer of the REP certificate from Rent A Center to Amvensys.¹¹
- Fourth, dPi Energy failed to disclose in its Change of Ownership Application that one of its principles – Mr. Lateef – was convicted of felony theft, in violation of P.U.C. SUBST. R. 25.107(g)(2)(E).¹²
- Fifth, dPi Energy failed to timely demonstrate compliance with the technical and managerial requirements of P.U.C. SUBST. R. 25.107 (g)(1)(D) and (E).¹³
- Sixth, dPi Energy failed to timely demonstrate compliance with the financial requirements of P.U.C. SUBST. R. 25.107(f)(2).¹⁴
- Seventh, dPi Energy failed to disclose the complaint history, disciplinary record and compliance record of Sure Electric, LLC d/b/a Riverway Power (Riverway Power), in violation of P.U.C. SUBST. R. 25.107(g)(2)(B).¹⁵

⁷ Ex. No. 13, dPi Energy LLC's Response to CenterPoint Energy Houston Electric, LLC's First Request for Information (dPi Energy's Responses to CEHE's First RFI) at 3.

⁸ Ex. No. 15, Direct Testimony of Zahed "Ed" Lateef on behalf of dPi Energy, LLC (Lateef Direct) at 2:25-28.

⁹ *Notice of Violation by dPi Energy, L.L.C. of PURA §§ 17.004 and 39.101 and P.U.C. SUBST. R. 25.107, 25.474, 25.475, 25.479, 25.480, and 25.485 relating to Customer Protection Rules for Retail Electric Service*, Docket No. 38384, Consent Order (Dec. 17, 2010).

¹⁰ dPi Energy's Responses to Staff's First RFI, response to 1-2 at 3, which is Attachment "E" to Wright Direct at E beginning at Bates 000000068.

¹¹ See Brief on the Merits of dPi Energy, LLC at 1: Mr. and Mrs. Lateef, through a company he and his wife own jointly, Amvensys Telecom Holding, LLC (Amvensys) acquired dPi Teleconnect, LLC and dPi Teleconnect's wholly owned subsidiary, dPi Energy.

¹² Wright Responsive at 5:10-24; and Lateef Rebuttal at 3:5-10.

¹³ Staff's Initial Brief at 11.

¹⁴ Staff's Initial Brief at 11 which states that P.U.C. SUBST. R. 25.107(k)(2009) provided a "phase-in" provision for operating REPs that set a deadline of May 22, 2010 to demonstrate compliance with certain provisions of 25.107(f) and (g); and Responsive Testimony of Zahed "Ed" Lateef (Lateef Responsive) at 1:20-22: "dPi provided information regarding the Company's technical and managerial expertise in compliance with Commission Substantive Rule 25.107 on July 22, 2010..."

- Eighth, dPi Energy provided false or misleading information to the Commission regarding Mr. Lateef's role with Riverway Power.
- Ninth, Mr. Lateef's history in the Texas REP market demonstrates that dPi Energy lacks the managerial resources and ability to own and operate dPi Energy.¹⁶

III. DPI ENERGY ADMITTEDLY IS IN VIOLATION OF COMMISSION RULES AND REFUSES TO COMPLY WITH THE COMMISSION'S PROHIBITION ON REP OWNERSHIP AND CONTROL IN P.U.C. SUBST.R. 25.107 (g)(1)(D)

The Commission's rules prohibit Mr. Lateef from owning more than 10% of a retail electric provider (REP) or from directly or indirectly controlling a REP.¹⁷

dPi Energy and Mr. Lateef admit that dPi Energy is currently in violation of the Commission's REP ownership prohibition rule, and both have been in violation of Commission rules since Mr. Lateef purchased dPi Energy from Rent A Center on November 17, 2009.¹⁸

There is no impediment or barrier to Mr. Lateef selling dPi Energy or relinquishing its REP Certificate to comply with Commission rules. Yet, Mr. Lateef has steadfastly declined alternatives that would place dPi Energy in compliance with Commission rules because Mr. Lateef refuses any alternative that does not, in his opinion, adequately compensate him for his investment in dPi Energy.

Mr. Lateef testified that he has received multiple offers to purchase the "customer relationships of dPi Energy on a \$/customer basis," but that he declined those offers because they are "below the value of my investment in the Company" and "below would I would regard as an appropriate market valuation for the Company."¹⁹ Mr. Lateef also testified that he has made no efforts to market or sell dPi Energy.²⁰ This, despite the fact that Commission Staff filed its

¹⁵ Ex. No. 1, Direct Testimony of Christine L. Wright on behalf of Staff (Wright Direct) at 14:15 through 15:25; and Staff's Initial Brief at 13-14.

¹⁶ Commission Staff's Initial Brief at 14-17.

¹⁷ P.U.C. SUBST. R. 25.107(g)(1)(D).

¹⁸ Lateef Direct at 2:25-28; and *see* Brief on the Merits of dPi Energy, LLC at 1: dPi Energy, LLC was purchased by Mr. Lateef on November 17, 2009.

¹⁹ Lateef Direct at 4:8-15.

²⁰ Ex. No. 12, Transcript and Video of the Deposition of Zahed "Ed" Lateef at 84:1-7:

counter-petition to revoke dPi Energy's REP certificate more than eight months ago; thus, clearly putting Mr. Lateef and dPi Energy of their significant violation of the Commission's rule prohibiting Mr. Lateef from owning or directly or indirectly controlling a REP.

Although Mr. Lateef purchased dPi Energy in violation of Commission rules and continues to own and control it in violation of Commission rules, he testified that he should not have to sell the company at a significant loss.²¹

Staff's position is that dPi Energy and Mr. Lateef have been in significant violation of Commission rules since November 2009, they refuse to comply with Commission rules, and that Staff has worked with dPi Energy for more than a year to find a solution that would place dPi Energy in compliance with Commission rules. dPi Energy insists upon an alternative that would divest Mr. Lateef's ownership interest into a trust and purportedly protect Mr. Lateef's investment, but it would allow him to directly or indirectly control dPi Energy in violation of Commission rules.

Therefore, dPi Energy's REP certificate must be revoked.

IV. DPI ENERGY'S PROPOSED TRUST AGREEMENT IS SPECULATIVE, NOT RIPE FOR APPROVAL IN THIS PROCEEDING, AND DOES NOT CURE DPI ENERGY'S ADMITTED VIOLATION OF P.U.C. SUBST. R. 25.107(g)(1)(D)

In an attempt to protect Mr. Lateef's investment in the company, dPi Energy argues that its Proposed Trust Agreement should be considered and authorized in lieu of revocation.²²

However, dPi Energy has submitted a proposed trust instrument that has not been executed, is hypothetical and speculative, and is not before this Commission in the proper form for which dPi Energy offers it for consideration - a change of ownership REP amendment application to transfer dPi Energy's REP certificate from dPi Teleconnect (owned by Mr. and

Question: All right. Have you made any efforts to market or sell dPi Energy?

Answer (Lateef): No.

Question: And why not?

Answer (Lateef): Well, because in the current situation the - we could never get the value that - that the comp - that we could if we weren't in this situation.

²¹ Lateef Direct at 4:16-18.

²² Brief on the Merits of dPi Energy, LLC at 6-7.

Mrs. Lateef) to the trust. Thus, approval of this speculative, hypothetical trust is not ripe for consideration in this proceeding.

Should the Commission, however, choose to consider this hypothetical trust, CenterPoint and Commission Staff have identified significant concerns with the proposed trust.

Mr. Lateef proposes to divest the entire ownership interest of dPi Energy (for both himself and his wife) into a trust for the benefit of his children.²³ While this may cure the ownership prohibition of P.U.C. SUBST. R. (g)(1)(D), Staff's position is that such a transfer does not cure the direct or indirect control prohibition of P.U.C. SUBST. R. (g)(1)(D).

The evidence shows that the Proposed Trust Agreement would give Mr. Lateef many opportunities for direct and indirect control of dPi Energy. Not only is this a violation of P.U.C. SUBST. R. (g)(1)(D), with Mr. Lateef's history of non-compliance with Commission rules it is especially important that he not be allowed the opportunity to exercise direct or indirect control over a REP in Texas.

As CenterPoint's trust expert witness, Darin N. Digby, testified the Proposed Trust Agreement falls significantly short of removing Mr. Lateef from exerting control over dPi Energy by giving Mr. Lateef a great deal of indirect control over the trust estate or providing opportunities for Mr. Lateef to reacquire direct control over dPi Energy.²⁴

Mr. Digby identified, in detail, the many avenues in which the Trust Proposal Agreement would allow Mr. Lateef to exert direct or indirect control over dPi Energy including:

- 1) the right to reacquire trust property by substituting property of equivalent value gives Mr. Lateef control over dPi Energy;²⁵
- 2) the choice of the initial trustee (Robert Gaston, an employee and related or subordinate party) allows Mr. Lateef control over dPi Energy;²⁶
- 3) the trustee removal and replacement provisions of the Proposed Trust Agreement gives Mr. Lateef effective control over dPi Energy;²⁷
- 4) the trustee's power to deal with related parties gives Mr. Lateef the opportunity to exercise control over dPi Energy;²⁸

²³ Lateef Responsive at 9:6-12.

²⁴ Ex. No. 20, Rebuttal Testimony of Darin N. Digby on Behalf of CenterPoint Energy Houston Electric, LLC (Digby Rebuttal) at 4:7-14 and 8:10-14.

²⁵ *Id.* at 4:15 through 5:16.

²⁶ *Id.* at 5:17 through 6:6.

²⁷ *Id.* at 6:15 30.

- 5) the trustee's power to merge the trust into another trust gives Mr. Lateef the opportunity to exercise control over dPi Energy;²⁹

The Proposed Trust Agreement does not prohibit Mr. Lateef from serving as trustee, and there are no detrimental tax consequences from Mr. Lateef (grantor) from serving as trustee.³⁰

V. THE “ADMIRABLE SPIRIT OF REDEMPTION” DOES NOT APPLY TO A COMPANY THAT IS IN SIGNIFICANT VIOLATION OF COMMISSION RULES AND IS CURRENTLY BEING INVESTIGATED FOR ADDITIONAL RULE VIOLATIONS

dPi Energy argues that revocation is a “draconian remedy which, in this case, will result in market disruption, confusion to customers, cost and administrative burden to ERCOT and the transmission and distribution utilities (TDU), the loss of a significant number of jobs, and ultimately, the loss of a business that in the admirable spirit of redemption has worked very hard to put its legacy of non-compliance behind it to emerge as a vibrant, compliant, stakeholder in ERCOT.”³¹

First, transferring dPi Energy's customers to other REPS – or even to POLR – will cause market disruption and will be an administrative burden to ERCOT and TDUs. This eventuality is, however, anticipated and provided for under the Commission's rules. Furthermore, several TDUs - CenterPoint, TNMP, AEP TCC, and AEP TNC – intervened in this proceeding and in their joint initial brief stated that “although revocation is not a remedy the Utilities recommend lightly, it is unfortunately the only proper remedy where, as here, the REP has wholly failed to correct an admitted violation of the law.”³²

Second, while dPi Energy has worked with Staff over the course of the last year on certain issues, the “admirable spirit of redemption” is lacking for Mr. Lateef and dPi Energy considering the history and pattern of significant rule violations, latent compliance with Commission rules, and continuing investigations by Commission Staff.

²⁸ *Id.* at 7:1-13.

²⁹ *Id.* at 7:14-25.

³⁰ *Id.* at 7:26-8:8.

³¹ Brief on the Merits of dPi Energy, LLC at 7.

³² Initial Brief of CenterPoint Energy Houston Electric, LLC, Texas-New Mexico Power Company, AEP Texas Central Company, and AEP Texas North Company at 1.

In the NOV consent order dPi Energy admitted to 27 rule violations, including violations that pertain to fundamental consumer protection requirements including: failure to disclose customers' rights of rescission; failure to provide the total average price on the Electricity Facts Label (EFL) for variable products; and failure to adequately fund its segregated cash account for unearned payments.³³ For two months, dPi Energy dragged its heels in filing the amendment application to report a change of ownership and control from Rent a Center to Mr. Lateef's holding company Amvensys.³⁴ Mr. Lateef, on behalf of dPi Energy, admitted that he knew that a REP amendment application was required³⁵ and managed to file it three months early for dPi Teleconnect (a related company acquired by Mr. Lateef at the same time); yet, it was filed two months late and only at the behest of Staff.³⁶

In the Change of Ownership Application, dPi Energy failed to fully disclose the compliance histories of National Power and Riverway Power.³⁷ dPi Energy admittedly failed to disclose Mr. Lateef's felony theft conviction.³⁸ dPi Energy did not timely comply with new managerial, technical and financial REP rules.³⁹

Many of the recent changes made by dPi Energy and Mr. Lateef (hiring a compliance manager, hiring a compliance consultant, actually reading the Commission's rules) did not begin until well after Staff's counter-petition to revoke its certificate was filed.⁴⁰ Mr. Lateef did not begin negotiations with ERCOT and TDUs to pay the debts owed by his former company

³³ *Notice of Violation by dPi Energy, L.L.C. of PURA §§ 17.004 and 39.101 and P.U.C. SUBST. R. 25.107, 25.474, 25.475, 25.479, 25.480, and 25.485 relating to Customer Protection Rules for Retail Electric Service*, Docket No. 38384, Consent Order (Dec. 17, 2010); and Wright Direct at 21:1-19.

³⁴ Wright Direct at 14:1-14.

³⁵ Lateef Direct at 2: 1-5.

³⁶ Wright Direct at 14:1-14.

³⁷ Wright Direct at 14:15 through 15:2.

³⁸ Lateef Rebuttal at 3:5-10.

³⁹ Staff's Initial Brief at 11 which states that P.U.C. SUBST. R. 25.107(k)(2009) provided a "phase-in" provision for operating REPs that set a deadline of May 22, 2010 to demonstrate compliance with certain provisions of 25.107(f) and (g); and Responsive Testimony of Zahed "Ed" Lateef (Lateef Responsive) at 1:20-22: "dPi provided information regarding the Company's technical and managerial expertise in compliance with Commission Substantive Rule 25.107 on July 22, 2010..."

⁴⁰ Ex. No. 18, Responsive Testimony of Patricia Dolese on behalf of dPi Energy, LLC (filed on Dec. 10, 2010) at 17:15-16: "I am aware that dPi Energy recently hired Mr. Steven Williams as their General Counsel and head of Regulatory Compliance.;" Ex. No. 11, Transcript of Deposition of Patricia Dolese at 54:8-15 in which Ms. Dolese testified that she has been on retainer with dPi Energy since December; Ex. No. 12, Transcript and Video of the Deposition of the Zahed "Ed" Lateef at 38:25 through 39:10 in which Mr. Lateef testified that he had not read the Commission's REP rule until 2010.

Riverway Power until it was clear that Staff was moving to revoke dPi Energy's REP certificate.⁴¹

Additionally, as stated in Staff witness Wright's rebuttal testimony, over the last year dPi Energy has been under investigation by the Oversight and Enforcement Division (O&E) for additional violations. These investigations relate to customer complaints, levelized billing, the rate charged to customers, and third-party sales.⁴²

VI. MR. LATEEF'S HISTORY IN THE TEXAS REP MARKET

In dPi Energy's brief on the merits, dPi Energy alleges that Staff's testimony "goes too far," and is inaccurate in some respects. Staff finds it interesting that dPi Energy (which has a history of rule violations) and Mr. Lateef (who not only has a long history of rule violations, but in fact had never read the Commission's rules until 2010 despite owning REPs in the Texas market dating back to 2005)⁴³ offer their own creative interpretation of Commission rules and criticize Staff witness Wright's interpretation of Commission rules.

As detailed in Staff's initial brief, Mr. Lateef was an owner, principal, and director of two REPs – Riverway Power and National Power Company, Inc. (National Power).⁴⁴ Both REPS have a demonstrated pattern of violating Commission rules while Mr. Lateef was the owner, principal and director.⁴⁵

⁴¹ Staff's First Request for Information to dPi Energy, LLC 1-1 through 1-47 was filed on February 19, 2010; and Lateef Responsive at 7:28-31: "in March 2010, I employed Mr. James Brazell to contact ERCOT and each of the TDUs to which Riverway owed money upon its exit from the market."

⁴² Ex. No. 5, Rebuttal Testimony of Christine L. Wright on behalf of Commission Staff (Wright Rebuttal) at 6:22 through 9:2.

⁴³ Ex. No. 12, Transcript and Video of the Deposition of Zahed "Ed" Lateef at 38:25 through 39:10:

Question: Have you read the rules that govern the ownership of a rep (sic)?

Answer (Lateef): Not until this year, last – 2010.

Question: Why did you not read them before that?

Answer (Lateef): I just – during the acquisition process there is a lot of paperwork and documentation and I was relying on other – other potential partners who I work with to – to do that.

Question: Were you aware that there are rules governing the ownership of a rep (sic)?

Answer: Not fully.

⁴⁴ Staff's Initial Brief at 15; and Wright Direct at 17:1-4.

⁴⁵ *Id.* at 14 – 17.

A. Pursuant to Commission Rules, Riverway Power is an Affiliate of dPi Energy and was Required to be Disclosed in the Change of Ownership Application

In response to Staff's testimony that dPi Energy should have disclosed the complaint history of Riverway Power in its Application, dPi Energy asserts that Staff "incorrectly interpreted" the definition of affiliate and the application of that term with respect to P.U.C. SUBST. R. 25.(g)(2)(B).⁴⁶ dPi Energy argues that because Riverway Power's REP certificate had been revoked by the Commission at the time dPi Energy filed its application, Riverway was no longer an entity with which Mr. Lateef was affiliated as the company no longer existed.⁴⁷ dPi Energy further argued that the definition of "affiliate" uses the present tense and not the past tense; thus, the rule does not require the disclosure of information for a company that no longer exists and therefore is not affiliated with the applicant.⁴⁸

As a State Office of Administrative Hearings administrative law judge (ALJ) recently stated in another REP revocation proceeding, it is important to look to the purpose of the rule to determine the applicant's obligation when the compliance disclosure requirements of P.U.C. SUBST. R. 25.107(g).⁴⁹ As stated by the ALJ in that case, the Commission's goal is to obtain information about "...any...compliance record" that might provide Staff and the Commission with insight about the applicant and its principals.⁵⁰ Contrary to dPi Energy's argument that it was not required to disclose the complaint history of Riverway Power because it is not a "current" affiliate of dPi Energy, the rule contemplates a "look back" period of 60 months which clearly conveys the Commission's intent to require applicants to disclose information of all affiliates providing "utility-like" services within the past five years and not just current affiliates.

⁴⁶ Brief on the Merits of dPi Energy, LLC at 14.

⁴⁷ *Id.* at 14-15.

⁴⁸ *Id.* at 15.

⁴⁹ *Petition of Commission Staff to Revoke the Retail Electric Provider Certificate of Milagro Power Company*, Docket No. 37753, PFD at 18 (Feb. 8, 2011).

⁵⁰ *Id.*

B. It is a Violation of Commission Rules to Provide False and Misleading Information to the Commission; Specific Intent is Irrelevant.

In response to Staff's evidence that dPi Energy misled the Commission regarding his position at Riverway Power, dPi Energy argues that Mr. Lateef did not "intentionally" provide false or misleading information to the Commission.⁵¹ The fact is that the statements in the Change of Ownership Application filed by dPi Energy in this proceeding did provide misleading statements regarding Mr. Lateef's role with Riverway Power.⁵²

P.U.C. SUBST. R. 25.107(j)(1) states that providing false or misleading information to the commission is a significant violation of Commission rules. The rule does not specify that *intentionally* providing false and misleading information is a rule violation; thus, whether Mr. Lateef or dPi Energy "intended" to mislead the Commission is not relevant. Clearly, if Mr. Lateef and dPi Energy's best argument against this allegation is that Mr. Lateef did not "intend" to mislead the Commission then, in effect, dPi Energy admits to providing misleading statements to the Commission in violation of P.U.C. SUBST. R. 25.107(j)(1).

C. Riverway Power's Debts to ERCOT and TDUs

In its brief on the merits, dPi Energy argues that Mr. Lateef has committed to resolving the amounts owed to the identified TDUs and ERCOT; therefore, this eliminates an additional basis for revocation.⁵³

dPi Energy and Mr. Lateef admitted that Riverway Power exited the market owing money to one or more TDUs⁵⁴ and owed or currently owes CenterPoint Energy Houston Electric approximately \$310,000.00, Oncor Electric Delivery \$74,904.40, AEP TCC and TNC \$54,000.00, and TNMP \$24,534.00.⁵⁵ Additionally, Riverway Power owes ERCOT approximately \$1,199,544.00, and this amount was charged to other Qualified Scheduling

⁵¹ Brief on the Merits of dPi Energy, LLC at 18.

⁵² Staff's Initial Brief at 12-13; and Wright Direct at 11:12 through 12:10.

⁵³ Brief on the Merits of dPi Energy, LLC at 20.

⁵⁴ Wright Direct at Attachment "E" at Bates 000000074 (dPi Energy's Responses to Staff's First RFI, response to 1-15 at 9).

⁵⁵ Wright Direct at 19:4-7; and Ex. No. 14, Affidavit of Susan J. Neel.

Entities (QSE) representing Load Service Entities (LSE) by ERCOT, based on its protocols (9.4.4 Subsection (5)).⁵⁶ ERCOT filed suit against Sure Electric LLC, d/b/a Riverway Power for breach of contract and seeks damages for the principle amount due to ERCOT plus interest.⁵⁷

First, there is no evidence that Mr. Lateef began negotiations with any of the TDUs or ERCOT prior to Staff filing its counter-petition for revocation. Only with his back against the wall, so to speak, did Mr. Lateef begin to address these debts still owed by his former company, Riverway Power.⁵⁸ This is supported by the fact that there is no record evidence that Mr. Lateef began to pay of some of the smaller debts owed to TDUs or made partial payments and entered a payment plan for the TDUs to which larger amounts are owed. These actions likely occurred sometime after rebuttal testimony was filed and prior to the filing of initial briefs.

Second, no agreement has been reached with ERCOT for the nearly \$1.2 million that was uplifted to the market.⁵⁹

It is important to note that committing, and beginning, to pay off these debts does not “eliminate an additional basis for revocation” as argued by dPi Energy.⁶⁰ This latent effort to address the significant debts owed by Riverway Power does not erase the rule violations of Riverway Power, and one of the principals that currently owns and operates dPi Energy. P.U.C. SUBST. R. 25.107(j)(8) and (16) state that failure to timely remit payment for invoiced charges to ERCOT and TDUs pursuant to the terms of their tariff constitute significant violations of Commission rules and renders the REP subject to revocation. dPi Energy, itself, is not responsible for the rule violations and debts owed by Riverway Power. However, the rule violations of Riverway Power while Mr. Lateef was an owner, director, and principal demonstrate that he does not have the managerial and technical resources to operate a REP in Texas.

⁵⁶ Wright Direct at 19:14-18.

⁵⁷ Wright Direct at 19:18 through 20:1/

⁵⁸ Staff’s First Request for Information to dPi Energy, LLC 1-1 through 1-47 was filed on February 19, 2010; and Lateef Responsive at 7:28-31: “in March 2010, I employed Mr. James Brazell to contact ERCOT and each of the TDUs to which Riverway owed money upon its exit from the market.”

⁵⁹ Brief on the Merits of dPi Energy, LLC at 20-21.

⁶⁰ *Id.*

D. Mr. Lateef is Responsible for the Actions of National Power During the Time he Served as Owner, President and Director of the REP

dPi Energy argues that Staff, in particular, is inaccurate in its portrayal of Mr. Lateef as a ‘bad actor’ when it comes to National Power.⁶¹ dPi Energy and Mr. Lateef argue that Mr. Lateef should not be held responsible for the actions of National Power when he was the owner, president and director because he had no “operational role” in the company.⁶² This is simply wrong, and Mr. Lateef seems to be in complete denial about his responsibility for the company.

Staff did testify that Mr. Lateef was an owner and officer of two REPs that experienced a mass transition of its customers to POLR. dPi Energy argues that this is not accurate because Mr. Lateef was not the owner at the time that National Power experienced a mass transition of its customers to POLR and accuses Staff of a “spurious” and “disingenuous” attempt to paint Mr. Lateef with the actions of Mr. Adley Wahab who purchased National Power from Mr. Lateef in 2007.⁶³ Curiously, dPi Energy omitted that Staff also testified (and acknowledged in its initial brief) that the mass transition of National Power took place after Mr. Lateef sold his ownership interest.⁶⁴ Therefore, Staff’s testimony taken as a whole – rather than one sentence taken out of context – is accurate.

There is more than enough evidence to demonstrate that Mr. Lateef has a long history of significant Commission rule violations. Staff focused on the specific violations of Mr. Lateef while he was the owner and president of National Power; but, also endeavored to accurately convey the compliance history of National Power for the ALJ and Commissioners. dPi Energy’s criticism of Staff’s portrayal of Mr. Lateef’s relationship to National Power is hypocritical considering the fact that dPi Energy failed to disclose Mr. Lateef’s relationship to National Power (as owner, president and director) to Commission Staff and the Commission until compelled to do so through discovery in this proceeding.

Mr. Lateef, who admittedly never read the Commission’s rules and regulations for REPs until 2010,⁶⁵ argues that even though he was the President and Owner of National Power that he

⁶¹ *Id.* at 13.

⁶² *Id.* at 22-24.

⁶³ Brief on the Merits of dPi Energy, LLC at 22.

⁶⁴ Wright Direct at 17:13 through 18:12.

⁶⁵ Ex. No. 12, Transcript and Video of the Deposition of Zahed “Ed” Lateef at 38:25 through 39:10:

Question: Have you read the rules that govern the ownership of a rep (sic)?

was not responsible for the company while it was under his control. Mr. Lateef argues that because he had no “operational role” with National Power, that he should not be held responsible for its actions.⁶⁶ Clearly, Mr. Lateef is in denial about his responsibility for National Power.

As stated in Staff’s initial brief, National Power twice failed to file an amendment application to report a change in ownership (a violation of P.U.C. SUBST. R. 25.107(i)(5)(2007)(repealed 2009)), failed to obtain approval from the Commission prior to transferring the National Power REP certificate (a violation of P.U.C. SUBST. R. 25.107(i)(7)(2007)(repealed 2009), and never filed annual reports in violation of P.U.C. SUBST. R. 25.107(i)(4)(2007)(repealed 2009).⁶⁷

Staff’s position is that as the owner, president, and director of National Power, Mr. Lateef was responsible for complying with the Commission rules.

dPi Energy insists that Mr. Lateef was not responsible for filing the change of ownership amendment application to report the sale of National Power to Adley Wahab in 2007 because the rule in effect at the time⁶⁸ stated that the “transferee must complete and file with the commission the application form for certification that demonstrates the transferee’s financial and technical fitness to render service under the transferred certificate.”⁶⁹

Obviously, dPi Energy is grasping at straws in its interpretation of Commission rules. Its argument that the transferee was required to file the application does not negate the rule’s requirement that a “REP certificate shall not be transferred without prior commission approval.” Mr. Lateef admits that the entire ownership interest of National Power was sold to Mr. Adley Wahab in 2007; yet, National Power did not seek prior approval from the Commission as required by P.U.C. SUBST. R. 25.107(i)(7). Therefore, Mr. Lateef clearly violated P.U.C. SUBST. R. 25.107(i)(7) and its argument that the transferee was required to file the application is

Answer (Lateef): Not until this year, last – 2010.

Question: Why did you not read them before that?

Answer (Lateef): I just – during the acquisition process there is a lot of paperwork and documentation and I was relying on other – other potential partners who I work with to – to do that.

Question: Were you aware that there are rules governing the ownership of a rep (sic)?

Answer: Not fully

⁶⁶ Lateef Responsive at 3:22 through 4:12.

⁶⁷ Wright Direct at 16:24 through 17:18.

⁶⁸ P.U.C. SUBST. R. 25.107(i)(7)(2007)(repealed 2009), and attached as Exhibit “J” to Wright Direct at Bates 0000000221.

⁶⁹ Brief on the Merits of dPi Energy, LLC at 23-24.

simply a red herring – and a weak one at that - to distract attention from the fact that Mr. Lateef completely disregarded the Commission’s rules while in control of, and responsible for, National Power.

VII. PATTERN OF CLAIMING ‘I’M NOT RESPONSIBLE’ AND DISREGARD FOR COMMISSION’S AUTHORITY AND RULES

Mr. Lateef has a history and provides a litany of responses that all amount to “I was in a position of authority, but I’m not responsible” and “I didn’t *intend* to violate the Commission rules or the law.” The maxim “ignorance of the law is not an excuse” applies to Mr. Lateef in spades. There is extensive evidence that Mr. Lateef has a long history of violating Commission rules. Mr. Lateef’s professed ignorance of the Commission’s rules and regulations is particularly profound given that he has operated in the Texas REP market dating back to 2005.

- 1) Mr. Lateef, on behalf of dPi Energy, admitted that dPi Energy’s Change of Ownership Application failed to disclose his felony theft conviction, in violation of P.U.C. SUBST. R. 25.107(g)(2)(E).⁷⁰ Mr. Lateef testified that the theft “should have been disclosed,” but that his failure to disclose the theft conviction to the Commission was not “intentional.”⁷¹
- 2) Staff provided evidence that Mr. Lateef provided false and misleading information to the Commission regarding his role in Riverway Power.⁷² Yet Mr. Lateef testified that neither he nor dPi Energy “intentionally” provided false or misleading information to the Commission.⁷³ Mr. Lateef, and dPi Energy, attempt to obfuscate the Commission rules because clearly they have no defense to providing false and misleading information to the Commission.

⁷⁰ Lateef Rebuttal at 3:5-10

⁷¹ *Id.* at 2:6-15.

⁷² Wright Direct at 11:12 through 12:10 -- dPi Energy stated in the Change of Ownership Application that Mr. Lateef was a minority shareholder of Riverway Power, but “...was not one of the company’s executives and was not involved in the day to day operations of the company...” However, in a response to a request for information from Commission Staff, dPi Energy admitted that in addition to Mr. Lateef owning 15% of the membership units of Riverway Power Partners (which owned 100% of Riverway Power), that Mr. Lateef was a Director of Riverway Power and managed certain core functions of the REP, “during late April 2007, upon the departure of CEO of Riverway Power, Mr. Lateef assumed the role of Director and came in to manage certain functions of Riverway. This included obtaining power supply agreements and managing customer services related issues.”

⁷³ Wright Direct at 14:15 through 15:25; and Staff’s Initial Brief at 13-14.

- 3) dPi Energy and Mr. Lateef rely on the same faulty defense in its response to Staff's allegation that dPi Energy failed to disclose the complaint history of Riverway Power in its Change of Ownership Application, in violation of P.U.C. SUBST. R. 25.107(g)(2)(B). In its reply brief, dPi Energy argued that it was not required to disclose Riverway Power as an affiliate and that based upon discovery responses Staff was on notice that of the relationship between Mr. Lateef and Riverway Power.⁷⁴ Thus, there was "no intent" on dPi Energy's part to obscure the association with Riverway Power.⁷⁵ This is yet another faulty attempt by dPi Energy to excuse its violation of Commission rules. Additionally, the Commission's rules clearly place the burden of disclosing complaint history upon the applicant – not Commission Staff.
- 4) Staff presented evidence that dPi Energy filed its Change in Ownership Application two months late, in violation of Commission rules.⁷⁶ Mr. Lateef testified that he was aware that the Commission requires a REP to amend its certification, but claims that he was not aware of the timing requirement.⁷⁷ Staff finds this claim suspect, as dPi Teleconnect (the parent company of dPi Energy, which Mr. and Mrs. Lateef also own through the Amvensys holding company) filed its corollary telecommunications amendment application at the Texas PUC in early August of 2009 to report the same change of ownership as the one in this proceeding.⁷⁸ If Mr. Lateef filed the dPi Teleconnect change of ownership application three months before the transaction, there is a question as to why dPi Energy filed its change of ownership application two months late and only after repeated requests from Staff. It is arguable that Mr. Lateef may have been attempting to avoid Commission scrutiny of his purchase of dPi Energy, given his history in the Texas REP market.
- 5) Mr. Lateef argues that although he was owner, president and director of National Power, he was not required to file amendment applications to report changes in the

⁷⁴ Brief on the Merits of dPi Energy, LLC at 14-15.

⁷⁵ *Id.* at 15.

⁷⁶ dPi Energy's Responses to Staff's First RFI, response to 1-2 at 3, which is Attachment "E" to Wright Direct at E beginning at Bates 000000068; and Wright Direct at 13:13 through 14:14.

⁷⁷ Lateef Direct at 2:1-7.

⁷⁸ *Application of dPi Teleconnect, LLC for an Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 37341 (Aug. 7, 2009).

ownership structure, as required by Commission rules.⁷⁹ His position is that because he had no “operational role” at National Power, this violation of Commission rules is somehow excused.⁸⁰ In fact, he has the temerity to state that it was not until this proceeding that he became aware that no notices of change in organizational structure were filed for the transfer of part ownership of National Power –while he was still the President and Director of the company.⁸¹ This is explained by the fact that Mr. Lateef now admits that despite that his first foray into the Texas REP market dates back 2005, he had not read the Commission’s rules and regulations for REPs until 2010.⁸²

Mr. Lateef has certainly evidenced a disregard for Commission rules, and he continues to evidence a disregard for Commission rules in his ownership of dPi Energy in violation of the Commission’s prohibition on ownership and control rule.

VIII. CONCLUSION

dPi Energy has admitted that it is and has been out of compliance with Commission rules regarding the ownership of a retail electric provider for more than a year. dPi Energy has not taken the necessary steps to achieve compliance because its owner, Mr. Lateef, does not want to suffer a financial loss on his investment. His financial considerations do not excuse the failure to comply with Commission rules. Further, dPi Energy and Mr. Lateef have a history of repeated violations of other Commission rules.

Pursuant to PURA §§ 39.352, 39.356(a) and P.U.C. SUBST. R. 25.107(j), Staff respectfully requests that dPi Energy’s REP certificate be revoked for the reasons explained in Staff’s initial brief and above.

⁷⁹ Lateef Responsive at 4:1 – 12.

⁸⁰ *Id.*

⁸¹ Lateef Responsive at 4:1-12.

⁸² Ex. No. 12, Transcript and Video of the Deposition of Zahed “Ed” Lateef at 38:25 through 39:10:

Question: Have you read the rules that govern the ownership of a rep (sic)?

Answer (Lateef): Not until this year, last – 2010.

Question: Why did you not read them before that?

Answer (Lateef): I just – during the acquisition process there is a lot of paperwork and documentation and I was relying on other – other potential partners who I work with to – to do that.

Question: Were you aware that there are rules governing the ownership of a rep (sic)?

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director
Legal Division

Keith Rogas
Deputy Division Director
Legal Division

Robert M. Long
Managing Attorney
Legal Division

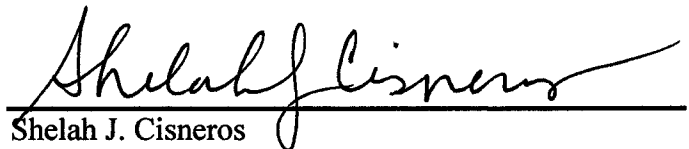


Shelah J. Cisneros
Attorney – Legal Division
State Bar No. 24045661
(512) 936 7292
(512) 936-7268 (facsimile)
Public Utility Commission of Texas
1701 North Congress Avenue
P.O. Box 13326
Austin, Texas, 78711-3326

SOAH DOCKET NO. 473-10-5401
DOCKET NO. 37917

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 18th of March, 2011, in accordance with P.U.C. Procedural Rule 22.74.



Shelah J. Cisneros